# Supreme Court of the United States



OCTOBER TERM, 1971.

No. 70-2.

UNITED STATES OF AMERICA,
*Appellant,*
*v.*
12 200-FT. REELS OF SUPER 8 MM. FILM ET AL.,
*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.

## MOTION OF CHRISTOPHER W. WALKER FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF CLAIMANT-APPELLEE.

ROGER C. PARK,
HARVEY A. SILVERGLATE,
ZALKIND & SILVERGLATE,
148 State Street,
Boston, Massachusetts 02109,
Attorneys for Amicus Curiae
Christopher W. Walker.

ADDISON C. MITCHELL & SON, INC., LAW PRINTERS, BOSTON.

## Table of Contents.



## Table of Authorities Cited.

### CASES.

STATUTES.



MISCELLANEOUS.

# Supreme Court of the United States.

OCTOBER TERM, 1971.

No. 70-2.

UNITED STATES OF AMERICA,
*Appellant,*
*v.*
12 200-FT. REELS OF SUPER 8 MM. FILM ET AL.,
*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

Christopher W. Walker respectfully moves that this court permit him to file an amicus curiae brief in support of the claimant-appellee in *United States* v. *Twelve 200-Foot Reels of Super 8 mm. Film*, No. 70-2. Movant's interest in the case is set forth in section I of the brief filed herewith.

Respectfully submitted,
By his attorneys,
ROGER C. PARK,
HARVEY A. SILVERGLATE,
ZALKIND & SILVERGLATE,
148 State Street,
Boston, Massachusetts 02109.

# Supreme Court of the United States.

---

OCTOBER TERM, 1971.

---

No. 70-2.

UNITED STATES OF AMERICA,
*Appellant,*
*v.*
12 200-FT. REELS OF SUPER 8 MM. FILM ET AL.,
*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.

---

## AMICUS CURIAE BRIEF IN SUPPORT OF CLAIMANT-APPELLEE.

### Interest of Amicus Curiae.

Amicus Walker's legal rights will be directly affected by the outcome of this action, since he is the claimant of three allegedly obscene magazines against which the government has instituted forfeiture proceedings in *United States* v. *One Magazine*, D. Mass. Misc. Civ. No. 70-45-F. One of the defenses to the aforesaid forfeiture action is that the three magazines were imported by him for his personal use and hence are privileged against seizure under *Stanley* v. *Georgia*, 394 U.S. 557 (1969). After initiating the forfeiture action, the government moved that the action against

claimant Walker's magazines be stayed pending this court's clarification of the scope of *Stanley* v. *Georgia*.[1] The stay was granted over claimant Walker's opposition. It is still in effect and claimant Walker's magazines are still in the hands of the government.

The Solicitor General granted permission to file a brief amicus curiae in the instant case on January 4, 1971. Amicus has been unable to reach claimant-appellee Ariel G. Paladini to request permission from him to file an amicus brief.[2]

Amicus fears that the following arguments would not receive sufficient development if his brief were not accepted:

(1) That *Stanley* v. *Georgia*, as a decision protecting an individual's right to harm his own mind if he pleases, conveys an absolute privilege upon mere private possession of obscenity.

(2) That 19 U.S.C. § 1305, though constitutional in its application to commercial importation, is unconstitutionally overbroad in its application to private importation.

Amicus notes that the claimant-appellee is appearing *pro se* in the instant action, and hence amicus briefs may be necessary for full development of essential issues.

---

[1] The government specifically moved that claimant Walker's case be stayed pending the outcome of *United States* v. *Various Articles of Obscene Merchandise, Fred Cherry, Claimant*, No. 706 (1969 Term), a case raising a *Stanley* v. *Georgia* issue substantially identical to the present one. *United States* v. *Various Articles of Obscene Merchandise* was dismissed on June 23, 1971, pursuant to Rule 60.

[2] Appellee Paladini is appearing *pro se*. Mail sent by amicus to appellee's addresses of record, P.O. Box 451, Sierra Madre, Calif., and 144 East Highland, Apartment F, Sierra Madre, Calif., has been returned marked "moved, left no address."

## Summary of Argument.

*Stanley* v. *Georgia*, 394 U.S. 557 (1969), creates a sphere of private autonomy which the government may not directly breach to "protect" the individual from reading or observing what he pleases. The government may prohibit commercial distribution, but it may not seize pornography belonging to the ultimate consumer. Mere private possession by an adult for purely personal use is absolutely privileged, at the border no less than in the home.

Even if mere private possession is not absolutely privileged, 19 U.S.C. § 1305(a) is unconstitutionally overbroad because it applies to both privileged and unprivileged forms of private possession. Commercial distributors do not have standing to challenge the overbreadth of § 1305(a), since commercial distribution is a "hard core" violation clearly beyond any constitutional privilege. However, all adults who possess pornography for purely personal use do have standing to challenge § 1305(a), and as to them the statute is unconstitutional.

## Argument.

### I. The Constitution Prohibits Seizure of Obscenity Discreetly Imported by an Adult for Personal Use.

*Stanley* v. *Georgia*, 394 U.S. 557 (1969), conferred a constitutional privilege upon what is characterized as "the mere private possession of obscene matter." 394 U.S. at 559. The *Stanley* court rejected the argument that the state has the "right to protect the individual's mind from the effects of obscenity." 394 U.S. at 565. It noted that there appeared to be "little empirical basis" for the assertion that exposure to obscene materials leads to deviant sexual behavior or crimes of sexual violence, 394 U.S. at 566, and concluded that "[g]iven the present state of knowledge,

the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the the ground that they may lead to the manufacture of home-made spirits." 394 U.S. at 567.

The chief thought behind *Stanley* was that the state had no business prohibiting mere possession of pornography by an individual because of a paternalistic desire to prevent him from harming himself. Thus, *Stanley's* roots are not in the First Amendment's specific provisions for free speech but in the time-honored libertarian doctrine that

> "[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their member, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant." J. S. Mill, On Liberty, 9 (A. Castell ed. 1947).

These ideals are clearly embedded in American constitutional tradition, and for legal purposes they can be grounded on the due process clause of the Fifth Amendment, on the penumbras of the First, Fourth and Fifth Amendments, or on the Ninth Amendment. See generally *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

*Stanley* did not, of course, establish an absolute rule prohibiting states from enacting laws to protect individuals from self-harm. Many such statutes have been passed, and no doubt others will be in the future. Two features of the statute examined in the *Stanley* case made it particularly offensive. First, the statute sought to protect individuals not from physical harm, but from mental harm caused by

receipt of information and ideas. The Court was clearly disturbed by this feature. It characterized *Georgia's* argument as being that states could deal with possession of obscenity

> "... just as they may deal with possession of other things thought to be detrimental to the welfare of their citizens. If the State can protect the body of a citizen, may it not ... protect his mind?"

In the course of rejecting this argument, the court emphasized that individuals have a "right to receive information and ideas, regardless of their social worth," 394 U.S. at 564. This language does not carry with it a correlative "right to distribute." It merely reflects the court's belief that direct interference with an individual's autonomous monitoring of his self-regarding conduct is more offensive when the state seeks to prevent him from harming his mind instead of his body. The *Stanley* court's recognition of the right to a zone of personal privacy within which individuals may monitor what they choose to receive mentally is thus not weakened by the court's subsequent holding in *United States* v. *Reidel*, 402 U.S. 351 (1971), that commercial distributors may be prosecuted and that obscenity is not within the protection of the First Amendment.

Secondly, the statute examined in *Stanley* directly intruded upon the life of the individual, instead of indirectly protecting him by punishing commercial distributors. The *Stanley* court understandably distinguished between commercial distributors and private possessors, thereby conforming to a tradition in American law of regulating self-regarding harm principally by striking at commercial facilitators and abettors, rather than directly interfering with what individuals have chosen to do with their own

minds and bodies.[8] There is absolutely no inconsistency between recognition of an absolute right to purely private possession of obscenity and broad power to prosecute commercial distributors.

The offensive features described in the foregoing paragraphs are just as prominent in the instant case as they were in *Stanley*. Understandably, the government passes over these features and fixes upon the fact that Stanley's pornography was seized in his house. Evidently, in the government's view, an individual may possess obscenity in his home but not in his automobile, his wallet, his luggage, his office desk, his safe deposit box, his mail or any other personal and private places. Such a strange result cannot lightly be accepted, notwithstanding the language in *Stanley* emphasizing the importance of the home. The Constitution does not make the home a medieval sanctuary beyond the law's reach, nor does an individual give up his right to be free from government interference when he steps beyond the threshold. He carries with him a "protective zone ensuring the freedom of [his] inner life, be it rich or sordid." *United States* v. *Reidel, supra,* 402 U.S. at 360 (concurring opinion of Mr. Justice Harlan).

---

[8] For example, distribution of instruments for use in masturbation has been forbidden, *e.g.*, Mass. General Laws, c. 272, § 21, but the act itself has hardly ever been prohibited, despite its supposed harms. See J. Kaplan, Marijuana—The New Prohibition, 312 (1970). This approach has been followed by many lawmakers in dealing with other consensual or "victimless" crimes such as gambling, prostitution, abortion or sale of alcohol to minors. Similarly, the government has chosen to require that automobile manufacturers furnish seat belts, even to customers who would not otherwise request them, but it has not required drivers to buckle them. Indeed, the constitutionality of such a requirement would be in doubt. See *American Motorcycle Ass'n* v. *Davids,* 158 N.W. 2d 72 (Mich. Ct. App. 1968), noted, 82 Harv. L. Rev. 469; *Everhardt* v. *New Orleans,* 208 So. 2d 423 (La. Ct. App. 1968) (requirement that motorcyclists wear crash helmets unconstitutional).

The government's brief confuses the concept of privacy with the concept of secrecy. *Stanley* was not intended simply to protect an individual from "intrusive inquiry" to determine the nature of materials possessed by him. That goal could have been accomplished simply by prohibiting the government from searching homes for the purpose of discovering pornography. *Stanley* clearly goes beyond that, and prevents the government from prosecuting an individual for possessing pornography at home even if it could do so without the necessity of a search of the home. The "privacy" protected in *Stanley* and *Griswold* v. *Connecticut* is not a narrow protection of an individual's right to secrecy in certain physical spheres. It is a right to "privacy" in a broader sense—in the sense that an individual has a sphere of private autonomy in which, in dealing with his own thoughts and his own mind, he may be free from direct governmental interference so long as he acts discreetly and does not harm others. The state interferes with this private sphere whenever it seizes obscenity belonging to the ultimate consumer, whether the seizure takes place at home, in transit, or from the mails. Hence, seizure of obscenity from luggage at a border crossing constitutes an unconstitutional interference with "privacy" whether or not the contents are entitled to secrecy.

Finally, the government argues that laws against the distribution of obscenity cannot be effectively enforced if persons are allowed to import obscenity for alleged private use. This argument is essentially the same as the one advanced by the state in *Stanley* v. *Georgia*, and rejected by the Court:

> "[W]e are faced with the argument that prohibition of possession of obscene materials is a necessary incident to statutory schemes prohibiting distribution. That argument is based on alleged difficulties of

proving an intent to distribute or in producing evidence of actual distribution. We are not convinced that such difficulties exist, but even if they did we do not think that they would justify infringement of the individual's right to read or observe what he pleases." 394 U.S. at 567-568.

The government has produced no empirical evidence to demonstrate why it is any more necessary to seize small quantities of obscenity at the border than it is to seize obscenity in the home. *A priori*, there seems to be no reason why would-be distributors of obscenity would be more likely to import obscenity from abroad—thereby creating additional risk of criminal prosecution based on discovery during customs searches—than they would be to manufacture it at home. At any rate, if Congress desires to restrict the private importation of obscenity in order to prevent covert importation for commercial purposes, it should do so in an appropriately limited statute. For example, Congress could provide that importation of more than a certain quantity creates a presumption that the purpose is distribution; it could provide for registration of private importers; it could make a false statement as to the purpose of importation a separate crime; perhaps it could even place the burden of proof as to the purpose of the importation upon the importer rather than the government. There are clearly less restrictive alternatives to the all-inclusive approach of § 1305.

III. Even if the Government would have Power to Seize Pornography Imported for Personal Use under an Appropriately Limited Statute, it may Not do so under the Unconstitutionally Overbroad Provisions of 19 U.S.C. § 1305.

Even if *Stanley* is given a narrow reading, so that it does not even protect the traveler carrying a small quantity

of pornography for personal use, 19 U.S.C. § 1305 would still be unconstitutional in many of its potential applications. Whatever the scope of the protective zone of privacy created by *Stanley*, it must at least cover such items as obscene letters between marital partners, an obscene diary, or an obscene manuscript carried by a traveler in his personal effects. These items could be subject to seizure under § 1305's broad prohibition of any obscene "writing."

Even without the *Stanley* doctrine, § 1305 would clearly be unconstitutional in some of its applications. For example, the statute provides that "the Secretary of the Treasury may, in his discretion, admit the so-called classics or books of recognized and established literary and scientific merit . . ." This clause implies that in the absence of a discretionary act by the Secretary, even books with clear redeeming social value—books with "established literary and scientific merit"—are subject to seizure under the statute. Moreover, § 1305 by its terms prohibits importation of books which lack literary or scientific merit but which are intended for use in legitimate scientific research. Importation of hard core pornography for bona fide research purposes is constitutionally privileged. *United States* v. *31 Photographs*, 156 F. Supp. 350 (S.D.N.Y. 1957). Finally, § 1305 is vague and overbroad because it contains a prohibition of "immoral" articles. The concept of "immorality" is undefined and all-embracing, not having received the same judicial definition and delimitation which has been given to the concept of "obscenity."

Because of its overbreadth, § 1305 should be invalidated as it applies to all non-commercial importation of pornography. No readily discernible standard can be evolved in one case which could isolate all of the unconstitutional applications of § 1305. Nor, within any permissible interpretation of the original purpose of the statute, can the statute be restrictively interpreted in one sweep so as to exclude

all possible unconstitutional applications. In these circumstances, the most appropriate judicial treatment of the statute is to hold it unconstitutional. See generally Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 858-863 (1970).

Commercial distributors do not have standing to raise the issue of the overbreadth of § 1305. See *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 377 (1971) (Harlan, J., concurring). Cf. *Dombrowski* v. *Pfister*, 380 U.S. 479, 491-492 (1965); *United States* v. *Thirty-Seven Photographs, supra*, 375, n. 3. There is no anomaly, however, in holding that § 1305 is void for overbreadth as applied to private importers, but that it may validly be applied to prohibit commercial importation. Commercial distributors are within the "hard core" of persons whose conduct is clearly not constitutionally privileged. The line between commercial and non-commercial speech activities is easily understood and well established. Compare *Breard* v. *Alexandria*, 341 U.S. 622 (1951) and *Jones* v. *Opelika*, 316 U.S. 584 (1942), with *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943) and *Martin* v. *Struthers*, 319 U.S. 141 (1943). See *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942). Holding that commercial importers may not challenge the overbreadth of § 1305 would therefore have no substantial "chilling effect" upon persons who are constitutionally privileged to import obscenity, since such persons can easily distinguish between commercial and non-commercial importation. In contrast, no easily understood *per se* rule is available which would enable persons affected by § 1305 to distinguish between privileged and non-privileged forms of non-commercial importation. Whatever constitutional standard this court adopts, the issue of whether a given private importation is privileged will turn upon a host of variables. Individuals desiring to import obscenity would be unable to predict whether their conduct would be lawful

or unlawful. Therefore, the statute should be held completely invalid as it applies to non-commercial importation. See generally Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 907-910 (1970). If Congress desires to prohibit some forms of non-commercial importation, it should do so in an appropriately limited statute. Congress is better equipped to promulgate a detailed, comprehensive set of rules establishing bright-line tests of privilege than is this Court, which must necessarily proceed by case-by-case adjudication.

The approach urged in the foregoing paragraph is similar to the one which has been followed by this court in its review of "Green River" ordinances prohibiting door-to-door solicitation. Such ordinances have been held invalid *in toto* as applied to non-commercial solicitation, even though some forms of non-commercial solicitation are not constitutionally privileged. At the same time, "Green River" ordinances have been held enforceable as applied to commercial solicitors.[4]

---

[4] "The analysis in . . . *Breard* [v. *Alexandria*, 341 U.S. 622 (1951)] . . . suggests that when a law covering both commercial and noncommercial canvassing is held bad 'on its face' it ought not necessarily follow that the law thereafter is unenforceable. If cut back to its commercial applications, the law would be shorn of substantial overbreadth—though at the cost of sparing some unprotected 'noncommercial' activity—and also would be fairly predictable in its permissible operation. *See* Note, *The Void-for-Vagueness Doctrine in the Supreme Court* [109 U. PA. L. REV. 67], 103n. 190. Absent fair warning problems, laws invalidated at the suit of a 'noncommercial' complainant—for example, the prohibition of anonymous pamphleteering condemned in *Talley* v. *California*, 362 U.S. 60 (1960)—might perhaps still be applied with respect to commercial messages." Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 909-910, n. 258 (1970).

## Conclusion.

For the reasons stated above, the court should hold that importation of pornography by adults for personal use is constitutionally privileged, and affirm the judgment below.

Alternatively, the court should hold that 19 U.S.C. § 1305 is unconstitutionally overbroad as applied to adults who import obscenity for personal use, and affirm the judgment below.

Respectfully submitted,

ROGER C. PARK,
HARVEY A. SILVERGLATE,
ZALKIND & SILVERGLATE,
Attorneys for Amicus Curiae
Christopher W. Walker.